



FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

DA 02-1270
May 28, 2002

Delaney M. DiStefano, Esq.
Schwaninger & Associates, P.C.
1331 H Street, N.W., Suite 500
Washington, DC 20005

Dear Ms. DiStefano:

This letter responds to correspondence filed on behalf of CommNet Communications Network, Inc. ("CommNet") requesting that the Auctions and Industry Analysis Division ("Division") waive the Commission's installment payment rules.¹ Specifically, CommNet requests that the Division suspend CommNet's installment payment obligations on a 900 MHz Specialized Mobile Radio Service ("SMR") license, MTA 7, T block, Dallas, Texas, for a one-year period commencing on November 30, 2001. For the reasons set forth below, we deny CommNet's request for waiver.

1. Background

On April 15, 1996, the Commission announced that CommNet was the high bidder for two 900 MHz SMR licenses,² including the license for MTA 7, T Block in the Dallas-Fort Worth, Texas area, in Auction No. 7.³ As a small business, CommNet was eligible to participate in the Commission's installment payment plan.⁴ Grant of the license for MTA 7, T Block was conditioned upon CommNet's full and timely performance of the payment obligations.⁵ As an eligible licensee qualifying as a small

¹ Letter from Delaney M. DiStefano, Counsel for CommNet Communications Network, Inc., to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, dated November 21, 2001 ("Request").

² CommNet was the high bidder for two 900 MHz SMR licenses in Auction No. 7: MTA 11, A Block, Atlanta, Georgia and MTA 7, T Block, Dallas, Texas. FCC Announces Winning Bidders in the Auction of 1,020 Licenses to Provide 900 MHz SMR in Major Trading Areas, *Public Notice*, 11 FCC Rcd 18599, 18611, 18613 Attachment A (1996) ("*April 1996 Public Notice*"). Subsequently, CommNet assigned the license for MTA 11, A Block to Bell South Wireless Data, L.P. ("Bell South"). Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 756 (rel. Jan. 17, 2001).

³ CommNet's net high bid for the MTA 7 T block license was \$ 552,500. *April 1996 Public Notice*, 11 FCC Rcd at 18613, Attachment A.

⁴ 47 C.F.R. §§ 1.2110(e) and 90.812(a) (1996).

⁵ 47 C.F.R. §§ 1.2110(e) and 90.812(a) (1996) ("An MTA license issued to an eligible small business that elects installment payments will be conditioned on the full and timely performance of the license holder' quarterly payments.").

business under 47 C.F.R. § 90.814(b)(1)(i), CommNet was scheduled to make interest-only payments for the first five years of the license term.⁶ Payments of interest and principal are amortized over the remaining five years of the license term.⁷ On November 30, 2001, CommNet was scheduled to begin making quarterly installment payments of interest and principal.⁸

The Commission's late payment rules for installment payments allow licensees to use two quarterly grace periods, subject to late payment fees, if the licensees require additional time to submit payment.⁹ Therefore, in accordance with the Commission's rules, if CommNet fails to make the November 30, 2001 quarterly installment payment with the associated late fees within the two quarterly grace periods, *i.e.*, by May 31, 2002, it will be in default, its license will automatically cancel, and it will be subject to debt collection procedures.¹⁰

2. Discussion

CommNet requests a waiver of the installment payment rules alleging that recent economic conditions, including an accelerated decline in CommNet's business after the September 11, 2001 events, have undermined its financial ability to meet its installment payment obligations and operate its 900 MHz systems.¹¹ Accordingly, CommNet requests that the Commission suspend its payment obligations for a one-year period starting November 30, 2001, with all interest accrued from November 30, 2001 until November 30, 2002 to be added to the outstanding principal.¹² In return for the Commission's deferral, CommNet proposes to resume making quarterly payments based on the recalculated amount commencing November 30, 2002.¹³ CommNet asserts that its proposal benefits the Commission because CommNet would pay more based on a recalculated schedule that includes the interest accrued during the one-year deferral period.¹⁴ CommNet argues that a grant of a waiver would advance the Commission's obligation under Section 309(j) of the Communications Act¹⁵ to disseminate spectrum to small businesses.¹⁶ CommNet also argues that

⁶ 47 C.F.R. § 90.812(a)(1) (1996).

⁷ *Id.*

⁸ Request at 2.

⁹ 47 C.F.R. § 1.2110(g)(4)(i)-(ii).

¹⁰ 47 C.F.R. § 1.2110(g)(4)(iv); *see also* Wireless Telecommunications Bureau Provides Guidance on Grace Period and Installment Payment Rules, 13 FCC Rcd 18213, 18214 (1998) ("*WTB Guidance PN*") ("Any licensee that becomes more than one-hundred eighty (180) days delinquent on an installment payment shall be in default, and the license shall automatically cancel without further action by the Commission. In that event, the debt shall be transferred to the Department of Treasury for collection subject to the Debt Collection Improvement Act of 1996").

¹¹ Request at 2. CommNet does not assert that it lost facilities during the September 11, 2001 events, rather, CommNet blames its financial problems on the downturn in the economy.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ 47 U.S.C. § 309(j)(3)(B).

grant of its request would also be consistent with prior Commission decisions such as the restructuring in the 218-219 MHz Service.¹⁷

To obtain a waiver of the Commission's rules, CommNet must show: (i) that the underlying purpose of the rule would not be served, or would be frustrated, by its application in this particular case, and that grant of the requested waiver would be in the public interest; or (ii) that the unique facts and circumstances of the particular case render application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest, or that CommNet has no reasonable alternative.¹⁸ For the reasons discussed below, we find that CommNet's waiver request fails to meet the Commission's standard for granting a waiver.

CommNet fails to show how the underlying purpose of installment payment rules would not be served, or would be frustrated, by application of the rules in this instance, and that grant of the requested waiver would be in the public interest. In designing a licensing system that employs competitive bidding pursuant to Section 309(j)¹⁹ of the Communications Act, the Commission determined that the Act's objectives would best be served by awarding licenses to those who value them most highly.²⁰ The Commission has repeatedly emphasized that strict enforcement of the installment payment rules enhances the integrity of the auction and licensing process by ensuring that winning bidders have the necessary financial capacity and that spectrum is awarded to those qualified bidders who value the spectrum most.²¹ Requiring licensees to comply with the full and timely payment rule is essential to a fair and efficient licensing process.²² Moreover, it is fair to all participants in our auctions, including those who won

¹⁶ Request at 4.

¹⁷ *Id.*

¹⁸ 47 C.F.R. § 1.925(b)(3).

¹⁹ 47 U.S.C. § 309(j).

²⁰ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd. 2348 ¶ 70 (1994) ("*Competitive Bidding Second Report and Order*").

²¹ Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, 15 FCC Rcd 25103, 25110-11 at ¶ 15 (2000) ("*Southern Communications MO&O*"), *further recon. denied Second Memorandum Opinion and Order*, FCC 01-298 (rel. Oct. 12, 2001) (Petition for review pending); Licenses of 21st Century Telesis, Inc., For Facilities in the Broadband Personal Communications Service, *Memorandum Opinion & Order*, 15 FCC Rcd 25113, 25117-18 at ¶ 10 (2000) ("*21st Century MO&O*") (Petition for review pending); Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly, *Public Notice*, 11 FCC Rcd 10853 (1996); *see WTB Guidance PN*, 13 FCC Rcd at 18214.

²² Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8348 at ¶ 8 (1998); *see also* In the Matter of Amendment of Part 1 of the Commission's Rules, Competitive Bidding Procedures, WT Docket No. 97-82, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, 4660- 4685 MHz, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 429, 430 ¶¶ 95-96 (1998); *Southern Communications MO&O*, 15 FCC Rcd at 25106, ¶ 7; Letter to Messrs. Stephen Diaz Gavin and Paul C. Besozzi, Counsel for U.S. Telemetry Corporation, from Margaret Wiener,

licenses in the auction and those who did not, and it fosters the promotion of economic opportunity and competition in the marketplace.²³ Thus, CommNet's assertion that waiver of the installment payment rules would further the public interest objectives of Section 309(j), fails to acknowledge that the provision for an installment payment program in this service furthered such objectives by providing small businesses the opportunity to bid on and pay for licenses won at auction.²⁴

The Commission's late payment rules for installment payments provide licensees experiencing financial difficulties a substantial amount of time within which to pursue private market solutions to their financial difficulties.²⁵ The Commission adopted these provisions for "extraordinary circumstances – instances of financial distress – for which temporary relief is appropriate."²⁶ The Commission has recognized that although there is considerable flexibility in its payment rules, "it is inevitable that some licensees will seek more time to pay," and, in this respect, the Commission's rules cannot accommodate every licensee's business plans.²⁷ In light of the flexibility already present in the installment payment rules, to allow CommNet additional time would only serve to undermine the purpose behind enforcement of the Commission's payment deadlines, which the Commission decided is best served by strict enforcement after the expiration of the two quarterly grace periods.²⁸ Accordingly, we find that CommNet has failed to demonstrate that the rule's purpose would not be served, or that it would be

Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, DA 02-819, at 5 (rel. 2002) ("*U.S. Telemetry Corporation Letter*").

²³ See Letter to Mr. Kurt Schueler, President of New England Mobile Communications, Inc., from Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, 16 FCC Rcd 19355, 19357-58 (2001) ("*New England Mobile Letter*").

²⁴ 47 U.S.C. §§ 309(j)(3) (the Commission shall design methodologies for competitive bidding that seek to promote its statutory public interest objectives) and 309(j)(4)(A) (the Commission shall consider alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments, that promote the objectives of Section 309(j)(3)(B)).

²⁵ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket 97-82, *Third Report and Order and Second Further Notice of Proposed Rulemaking*, 13 FCC Rcd 374, 439-440, ¶ 110 (1997) ("*Part 1 Third Report and Order*"); see also *Southern Communications MO&O*, 15 FCC Rcd at 25110, ¶ 15; *U.S. Telemetry Corporation Letter*, DA 02-819, at 5.

²⁶ Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15304-05, ¶ 19 (2000) ("*Part 1 Order on Recon of Third Report and Order*"); *Part 1 Third Report and Order*, 13 FCC Rcd at 440, ¶ 110; see also *U.S. Telemetry Corporation Letter*, DA 02-819, at 5.

²⁷ Amendment of the Commission's Rules Regarding Installment Financing for Personal Communications Services ("PCS") Licensees, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8354 at ¶ 24 (1997) ("No matter what deadline we establish, it is inevitable that some licensees will seek more time to pay."); see also *Southern Communications MO&O*, 15 FCC Rcd at 25110, ¶ 15; *New England Mobile Letter*, 16 FCC Rcd at 19357-58 (noting that the Commission's payment rules cannot accommodate every business plan).

²⁸ *Southern Communications MO&O*, 15 FCC Rcd at 25111, ¶ 15; *21st Century MO&O*, 15 FCC Rcd at 25117-18, ¶ 10; *New England Mobile Letter*, 16 FCC Rcd at 19357-58; *U.S. Telemetry Corporation Letter*, DA 02-819, at 5.

frustrated, by applying it to CommNet, and that petitioner has failed to show that grant of the requested waiver would be in the public interest.

CommNet's arguments concerning the facts and circumstances of its particular case do not change our analysis. CommNet's contention that a downturn in economic conditions coupled with a lack of financial participation by lenders has decreased its ability to fund the operation and development of its system and to make installment payments²⁹ is not a unique fact or circumstance that meets the waiver standard.³⁰ All licensees bear the risk of changes in the market. Licensees are obligated to maintain sufficient resources to both pay for and build out their licenses.³¹ CommNet had full notice that the grant of the license for MTA 7, T Block was conditioned upon CommNet's full and timely performance of the payment obligations and compliance with our general installment payment rules. Correspondingly, CommNet is responsible for the consequences that flow from its business decisions that might otherwise affect its financial situation and therefore its ability to meet its license payment obligations.³² Furthermore, CommNet's speculation that market conditions will improve is not an adequate basis for grant of a waiver. Finally, CommNet's contention that a grant of a waiver under these circumstances would be consistent with the Commission's decision in the 218-219 MHz proceedings to allow reamortization of installment payments is also unpersuasive.³³ In adopting the 218-219 MHz restructuring plan, the Commission recognized that the factors that led to the financial and technical difficulties in the 218-219 MHz Service were *unique* to that service and were unlikely to be repeated.³⁴ Thus, CommNet's particular financial difficulties do not constitute unique circumstances sufficient to justify waiver of our late payment rules.³⁵ Accordingly, CommNet's request is denied.

²⁹ Request at 2

³⁰ *New England Mobile*, 16 FCC Rcd at 19358 (holding that a 218-219 MHz licensee's inability to raise sufficient capital to build out and pay for licenses does not justify waiver of the payment rules particularly when the licensee assumed such risks in electing the resumption option); *U.S. Telemetry Corporation Letter*, DA 02-819, at 6 (holding that a 218-219 MHz licensee's contention that a decline in the financial markets decreased its ability to fund the operation and development of its system and to make installment payments does not justify waiver of the payment rules since the licensee accepted the risk in acquiring the licenses); *see also Southern Communication MO&O*, 15 FCC Rcd at 25107, ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule).

³¹ *See In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, Order*, 13 FCC Rcd 22071, 22072, ¶ 4 (1998) ("The challenge of raising capital to finance ... licenses exists in varying degrees for all licensees and does not constitute 'unique facts and circumstances.'"), *petition for recon. denied*, 14 FCC Rcd 6080 (1999), *aff'd.*, *SouthEast Telephone v. FCC*, No. 99-1164, 1999 WL 1215855 (D.C. Cir. Nov. 24, 1999).

³² This would hold true for any future acquisition of licenses in this or any other service.

³³ Request at 3-4.

³⁴ Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497, 1520, ¶ 37 (1999) (*emphasis added*).

³⁵ *See Southern Communications MO&O*, 15 FCC Rcd at 25107, ¶ 10 (holding that a failure to appropriately manage business arrangements does not justify waiver of the automatic cancellation rule); *U.S. Telemetry Corporation Letter*, DA 02-819, at 6.

CommNet Communications Network, Inc.
Delaney M. DiStefano, Esq.
May 28, 2002

Accordingly, IT IS ORDERED that, the Request filed by CommNet Communications Network, Inc., dated November 21, 2001 is DENIED.

IT IS FURTHER ORDERED that this letter shall be sent to the CommNet Communications Network, Inc. and its representatives by certified mail, return receipt requested.

This action is taken pursuant to Sections 4(i), 4(j), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 303(r), and 309(j), under authority delegated pursuant to Section 0.331 of the Commission's rules.³⁶

Sincerely,

Kelly Quinn
Deputy Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

³⁶ 47 C.F.R. § 0.331.